No. 21033

In the

United States Court of Appeals

For the Ninth Circuit

UNITED STATES OF AMERICA, For the Use and Benefit of CHICAGO BRIDGE & IRON COMPANY, an Illinois corporation,
Appellant,

vs.

ETS-HOKIN CORPORATION, a California corporation, and THE TRAVELERS INDEMNITY COMPANY, a Connecticut corporation,
Appellees.

On Appeal from the United States District Court for the District of Arizona

Appellant's Reply Brief

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TABLE OF AUTHORITIES CITED

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I

THE UNITED STATES IS A PARTY TO THE ACTION IN THE LOWER COURT FOR PURPOSES OF PERFECTING AN APPEAL UNDER RULE 73(a)(1) OF THE FEDERAL RULES OF CIVIL PROCEDURE.

Appellees contend that this Court lacks jurisdiction because Appellant's Notice of Appeal dated March 25, 1966 was not timely filed (Appellee's Brief P. 5); and that it was

not timely filed because Appellant cannot avail itself of the exemption provided by Rule 73(a) of the Federal Rules of Civil Procedure, which provides for a sixty day filing period in any action "in which the United States . . . is a party." According to Appellees, the United States is not a "true party" (Appellee's Brief P. 6) to the lower court proceeding and, therefore, Appellant's rights are governed by the thirty day filing period prescribed by the Rule 73(a).

There being no other authority directly on point, Appellant relied at the time and continues to rely upon the two cases cited by Appellees as authority for the proposition that Appellants are entitled to claim the exemption above-described.

The Court in *Barnard-Curtiss Company v. United States ex rel D. W. Falls Constr. Co.,* 252 F.2d 94 (10th Cir. 1958) noted several of the arguments advanced by Appellees herein, but was not persuaded that the United States did not have a genuine interest in affording bond protection for materialmen and subcontractors on Federal projects. Contrary to Appellees' interpretation, the Court in *Barnard-Curtiss Company* did not ignore the Supreme Court's holding in *Equitable Surety Co. v. United States to Use of W. McMillan & Son,* 234 US 448, 456 (1914), but gave it thoughtful consideration and concluded that the holding in that case did not require it to decide that the United States was not a party to the action for purposes of Rule 73(a). In fact, the *Barnard-Curtiss Company* Court cited the *Equitable Surety Co.* case, supra, for the proposition that the Government is a party who has a real interest or concern for the protection of the rights of the materialman and laborer under the *Miller Act's* predecessors. It quoted with approval the following language from the *Equitable Surety Co.* case, supra:

> "The public is concerned not merely because laborers and materialmen (being without the benefit of a mechanic's lien in the case of public buildings) would otherwise be subject to great losses at the hands of insolvent or dishonest contractors, but also because the security afforded by the bond has a substantial tendency to lower the prices at which labor and material will be furnished, because of the assurance that claims will be paid."

Appellees cite the *Equitable Surety Co.* case, supra, for the proposition that the United States is merely a trustee for the materialmen and laborers; therefore, merely a nominal party; therefore, not a true party to the action under Rule 73(a).

In the *Equitable Surety Co.* case, the surety was arguing for its release on the bond upon the grounds that the *Government,* as an obligee under the bond, and the contractor, as a principal, had made changes in a construction contract without the surety's knowledge, although such changes did not alter the general character of the work contemplated by the contract. While admitting the rule that any agreement altering the undertaking of the principal must be participated in by the obligee before it has the effect of discharging the surety, nevertheless, the court felt that since the Government was an obligee, in name only, with respect to the rights of materialmen and laborers, and that the latter could in no manner control the conduct of the Government as nominal obligee, the general principles of equity would not permit the Government to barter away the rights of the true beneficiaries of bonds, i.e. the materialmen and laborers. To permit such a construction under the circumstances, said the Court, would "defeat the principal object that Congress had in view in enacting the statute."

Thus, the Supreme Court adopted its view of the government's rule as Trustee in the *Equitable Surety Co.* case, supra, for the purpose of protecting the rights of the claimants under the bond and not for the purpose of defeating them. Recognizing this, the 10th Circuit gave short shrift to the idea that a *Miller Act* claimant's rights could be brusquely terminated on the grounds that the United States was not a "true party" to the lower court action for the purposes of Rule 73(a).

Unlike the late *Equitable Surety Co.* case, supra, the Supreme Court in *United States Fidelity & Guaranty Co. v. United States for Benefit of Kenyon,* 204 US 349, 357, 358, (1907), was faced with the question of whether the then United States Circuit Court under the *Judiciary Acts of 1887, 1888* (24 Stat. at Large, 552, Chap. 373; 25 Stat. at Large, Chap. 866), had jurisdiction to hear the case. Those Acts limited the court's jurisdiction to disputes of a value of $2,000 or less, unless the United States was a plaintiff in the action. The bonding company contended that the United States was a nominal party only and, therefore, jurisdiction would not lie. The Supreme Court found that for purposes of construing the *Judiciary Acts of 1887 and 1888,* the Government was a real party in interest, and not merely a nominal party. The Supreme Court in justifying its opinion cited those very elements of the Miller Act's predecessor which are today found in the *Miller Act* (40 USC 270), namely the statutory provisions calling for a bond guaranteeing prompt payment of materialmen and laborers. To quote the Court:

> "In a large sense the suit has for its main object to enforce that provision in the bond that requires prompt payments by the contractor to material men and laborers. The bond is not simply one to secure the faithful

performance by the contractor of the duties he owes directly to the government in relation to the specific work undertaken by him. It contains, as just stated, a special stipulation with the United States that the contractor shall promptly make payments to all persons supplying labor and materials in the prosecution of the work specified in his contract. This part of the bond, as did its main provisions, ran to the United States, and was herefore enforceable by suit in its name. We repeat, the present action may fairly be regarded as one by the United States itself to enforce the specific obligation of the contractor to make prompt payment for labor and materials furnished to him in his work. There is, therefore, a controversy here between the United States and the contractor in respect of that matter. The action is none the less by the government as a litigant party, because only one of the persons who supplied labor or materials will get the benefit of the judgment. We are of opinion, in view of the peculiar language of the act of 1894 for the protection as well of the United States as of all persons furnishing materials and labor for the construction of public works, that it is not an unreasonable construction of the words in the judiciary act of 1887, 1888, 'or in which controversy the United States are plaintiffs or petitioners,' to hold that the United States is a real, and not a mere nominal, plaintiff in the present action, and therefore that the circuit court had jurisdiction."

On the basis of the above cited Supreme Court cases, one might conclude as to the rights of materialmen and laborers (or subcontractors) under Miller Act type legislation that the Supreme Court has generally favored that interpretation of a statute or rule of law (a jurisdictional statute in the *Kenyon* case and a law of suretyship in the

Equitable Surety Co. case which advances or protects such rights. Thus, the Court in the *Barnard-Curtiss Company* case, supra, cannot be said to have failed to perceive any essential difference between the *Miller Act* and its predecessors.

According to Professor Moore, (Moore's Federal Practice, 2nd Edition, Vol. 7, Page 3163), the view that the thirty rather than the sixty day period applies if the Government was merely a formal or nominal party to the action in the District Court, "introduces an element of uncertainty in the very critical, because jurisdictional, area, of the time for appeal." He recommends against it finding favor and cites Judge Friendly's rejection of the test of the Government's interest in the case as equally conclusive against any except a quite literal reading of the phrase "any action in which the United States . . . is a party."

> "It is in the last degree undesirable to read into a procedural statute or rule, fixing the time within which action may be taken, a hidden exception or qualification that will result in the rights of clients being sacrificed when capable counsel have reasonably relied on the language. Section 2107 of Title 28 and F. R. Civ Proc. 73(a) unequivocally allow 'to all parties' 60 days to appeal in any action 'in which the United States or an officer or agency thereof is a party.' The stated criterion is whether the United States is a party to the action, a test clearly satisfied here, and not whether the United States is concerned with the particular order sought to be appealed—something that often cannot be accurately determined when the order is made."
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> *United States v. American Society of Composers, Authors & Publishers,* 331 F.2d 117, (CA 2d-1964) cert. den. 377 US 997 (1964)

II

CB&I'S USE OF THE RECORD IN THE ARBITRATION PROCEEDINGS TO DEMONSTRATE ITS "INHERENTLY UNFAIR" ARGUMENT IS NOT AN ATTEMPT TO HAVE THIS COURT REVIEW THE DECISION OF THE ARBITRATORS.

After having examined the Supreme Court's reasoning in *Wilko v. Swan,* 346 U.S. 427 (1953), it takes an aggressive mind to characterize an effort made to sustain the proposition set forth therein as to those circumstances which will warrant a public policy decision against application of the *Federal Arbitration Act,* as a transparent attempt to have this Court review the decision of the arbitrators.

It is difficult to demonstrate *in vacuo* the unfairness of the arbitration proceedings to the Appellant's legal rights. The record of the proceedings puts meat on the bones of the argument, so to speak.

This Court must first decide if Appellant has something specifically referred to as "Miller Act rights" and then it must decide if those rights conflict in certain instances with the rights supported by the *Federal Arbitration Act,* 9 U.S. Code, Section 3, et seq. If it then finds that the enforcement of the Arbitration Act under the circumstances of this case has the effect of denying to Appellant its rights under the *Miller Act,* then it must decide the question of which Federal Act has the paramount policy. The Supreme Court in *Wilko v. Swan,* supra, decided that with respect to a conflict between a private claimant's rights under the *Securities Act of 1933* and the right of a defendant under the *Federal Arbitration Act,* the *Securities Act* would prevail on grounds of a paramount public policy. Appellant herein seeks only to elicit a similar conclusion from this Court, and in advancing its argument to this end has deemed it appropriate, for illustration purposes only, to refer this Court to the Arbitration proceedings in this litigation.

Appellees argue that if Appellant is unhappy with the Arbitration proceedings and award, it should appeal the award on the grounds specified in the *Federal Arbitration Act*. As already noted, the areas of appeal under the Arbitration Act are extremely limited (See Appellant's Opening Brief, pp. 13 & 14), and there is no judicial review of legal issues not otherwise found in Sections 10 and 11 of the *Federal Arbitration Act*.

Appellees have noted in their brief the proceedings in the United States District Court, Northern District of California (Appellees Answering Brief p. 4, and Appendix A, B, & C thereto), and this Court should be aware that, in taking all steps to protect whatever rights the law allows to them, Appellant has sought judicial review of the arbitration award upon such specified statutory grounds as were available and has now appealed to this Court from an adverse judgment entered upon such review. It would be appropriate, in Appellant's view, for the appeal from the United States District Court for the Northern District of California to be consolidated with this appeal, so that those portions of the record common to both appeals need not be duplicated and the Court may consider at one time all matters now pending, pertaining to the validity of the arbitration proceedings. Appellant will move for such consolidation of appeals shortly.

Respectfully submitted,

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Attorneys for Appellant

I certify that, in connection with the preparation of this brief, I have examined Rules 18, 19 and 39 of the United States Court of Appeals for the Ninth Circuit, and that, in my opinion, the foregoing brief is in full compliance with those rules.

FRANK C. BROPHY, JR.